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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 546

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this cause on July 23, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals has not yet been reported, and is printed as Appendix A, *infra*. The opinion of the District Court is printed as Appendix B, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix C, *infra*) were entered on July 23, 1968. On August 12, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 21, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. Whether petitioners, having filed a motion for new trial attacking the constitutionality of their convictions because of the government's illegal eavesdropping, before and during their trial, on the conversations of petitioners, their counsel, and agents, should have been entitled to dismiss their motion without prejudice.

II. Whether the scope of the hearing in the District Court on the issue of the government's illegal eavesdropping was improperly limited by the Court's striking of certain allegations of such eavesdropping on defense counsel and defense agents.

STATEMENT.

Nature of the Case.

Petitioners were convicted in 1964 in the United States District Court for the Eastern District of Tennessee on a charge of endeavoring to influence petit jurors in the 1962 trial of **United States v. James R. Hoffa and Commercial Carriers, Inc.** Said convictions were affirmed by the Court of Appeals, 349 F. 2d 20 (6 Cir.), and by this Court, 385 U. S. 293. Petitioners since March 7, 1967 have been and are presently imprisoned in service of the sentences imposed on these convictions.

Motion for New Trial.

On February 28, 1967 petitioners filed in the District Court a motion for new trial based on newly discovered evidence, alleging that prior to and during the trial below petitioners, their counsel and associates were subjected by Government agents and representatives to wiretapping, illegal eavesdropping, and other unlawful interference (App. 12a-34a).[1] Attached to the motion for new trial were various affidavits and other documents corroborative of the allegations of the motion (App. 35a-121a). The motion in substance made the following assertions:

a. That during the trial below Justice Department agents and representatives had tapped the telephones of petitioner Hoffa and his counsel in their offices and living quarters, and had intruded on conferences between petitioners and their counsel (App. 12a, 16a-20a).

b. That a Justice Department representative, who was in charge of the investigation of petitioner Hoffa, had in his possession prior to the trial recordings of private conferences between petitioner Hoffa and his counsel, which recordings were exhibited to prospective Government witnesses (App. 12a, 20a-28a).

c. That telephone conversations of one of petitioner Hoffa's counsel, one Bufalino, were monitored and transcribed by City of Detroit police officers, under circumstances suggesting that such eavesdropping was performed on behalf of the Federal Government (App. 13a, 28a-30a).

d. That in the case of **United States v. O'Brien**, the Government conceded to this Court that it had during the trial below by illegal electronic surveillance overheard

[1] "App." references are to petitioners' joint appendix which was filed in the Court of Appeals.

two conversations of one Charles O'Brien, a close associate of and defense investigator for petitioner Hoffa in this case. At least one of said conversations was between said O'Brien and Hoffa's chief trial counsel in this case (App. 14a, 25a-26a).

e. That in 1961, while petitioner Hoffa's counsel were in Orlando, Florida in connection with his defenses of an earlier criminal case, an electronic transmitter was found in counsel's conference room, while counsel were conferring relative to said case (App. 30a-31a). The transmitter was turned over to the Federal Bureau of Investigation for examination, but was never returned (App. 86a-88a).

Proceedings in the District Court.

In response to the motion for new trial, the Government filed counter-affidavits, substantially denying the charges made in the motion (App. 129a-172a). By reason of the issues of fact thereby raised, the District Court ordered an evidentiary hearing on the motion (App. 183a-185a). The Court ordered that the scope of the hearing was "to be upon all issues of fact raised by the pending motion for new trial and any amendment thereto or that may be defined by further orders of the Court" (App. 188a).

On April 27, 1967, twelve days prior to the scheduled hearing, the District Court ruled that no evidentiary hearing would be permitted with regard to the allegations of wiretapping of counsel Bufalino's telephone, with regard to the discovery of the electronic transmitter in counsel's Orlando hotel room, or with regard to the Government's admitted eavesdrop and intrusion into the conversations of investigator O'Brien (App. 241a-242a).

The Dismissal of the Motion With Prejudice.

On the date of the scheduled hearing on the motion for new trial, defense counsel, in a requested conference in chambers, disclosed that certain information had just come to their attention, which was of such a nature that counsel felt it would be improper to proceed with the motion at that time (App. 247a). The defense moved that the hearing be continued for a period of ninety days, informed the Court that the matters which had come to the attention of the defense were learned as recently as thirty-eight hours before the hearing (App. 247a), and related to the matters which were the subject of the hearing (App. 260a).

The motion for continuance of the hearing was denied (App. 257a-258a), whereupon petitioners sought leave of Court to dismiss the motion for new trial without prejudice (App. 258a-260a). The Court denied such request (App. 261a), and called for the presentation of evidence in support of the motion (App. 261a). Petitioners informed the Court that under the circumstances they could not proceed, and renewed their motions for a continuance or a dismissal without prejudice (App. 262a). The Government moved for a denial of the motion for new trial (App. 267a), and on the following day the Court entered an opinion dismissing the motion for new trial with prejudice (App. 272a-277a), and thereafter entered a formal order denying the motion for the reasons set forth in its opinion (App. 279a).

The Court's ruling was affirmed by the Court of Appeals, which held that the District Court's denial of the motion for continuance and for leave to dismiss without prejudice did not constitute an abuse of discretion. The Court of Appeals held that it was proper for the District Judge to deny and dismiss the motion, and also ruled that

the District Court had properly stricken certain of the allegations of the motion because they were not "sufficiently relevant or material to the trial . . . to require taking testimony concerning them."

REASONS FOR GRANTING THE WRIT.

I. The Denial of Petitioners' Motion for Dismissal Without Prejudice of Their Motion for New Trial.

This case presents for determination by this Court the important question of whether a motion for new trial based on newly discovered evidence that the government had illegally electronically eavesdropped on the defendants and their counsel before and during the trial may be dismissed by the defense without prejudice. Essentially at issue is whether a defendant shall have the effective right to prove to the Court that his case was not tried without unlawful interference by the government in the councils of his defense. We submit that the denial of the motion for continuance of the hearing on the motion for new trial and the ultimate dismissal of said motion with prejudice, under the circumstances of this cause, constituted grievous error which should receive the authoritative review of this Court.

It must be remembered that the instant motion for new trial was filed on February 28, 1967 (App. 12a). On the date set for hearing of said motion, May 9, defense counsel moved for a continuance of said hearing date on the ground that certain information had come to the attention of counsel which was of such nature as made it improper for counsel to proceed with the hearing at that time (App. 243a-244a). Counsel requested a ninety day continuance so that they could become fully informed on the matters thus brought to their attention. Petitioners were then and

are now still incarcerated under the judgments of conviction below (App. 259a). Yet, the motion for continuance was denied (App. 257a-258a), and petitioners' motion that they be permitted to dismiss their motion for new trial without prejudice was likewise denied (App. 258a-261a).

These rulings by the District Court, it is urged, constituted a flagrant abuse of the Court's discretion. A dismissal with prejudice is a harsh sanction and a drastic remedy which should be resorted to only in extreme circumstances. **Davis v. Operation Amigo, Inc.**, 10 Cir., 378 F. 2d 101; **Independent Productions Corp. v. Loews, Inc.**, 2 Cir., 283 F. 2d 730; **Syracuse Broadcasting Corp. v. Newhouse**, 2 Cir., 271 F. 2d 910. The District Court in ruling on a motion to dismiss an action without prejudice should weigh all of the equities, and make that decision which seems fairest under all the circumstances of the particular case. **Klintworth v. Atlantic Coastline R. Co.**, D. C. S. C., 39 F. R. D. 330. Since the law favors the disposition of litigation on its merits, **Meeker v. Rizley**, 10 Cir., 324 F. 2d 269, and since dismissal of an action with prejudice even in a civil case is considered a harsh sanction, *a fortiori* should a defendant's claim in a criminal case not be lightly or procedurally foreclosed where the issue relates to the constitutionality of the conviction and the fairness of the trial. The discretion vested in the Court on the issue of whether a dismissal should be with or without prejudice is a judicial and not an arbitrary discretion. **International Shoe Company v. Cool**, 8 Cir., 154 F. 2d 778. The right to dismiss without prejudice ought not be defeated unless some plain legal prejudice would result to the opposing party. Can it be reasonably contended that under the circumstances of this case the government would have been prejudiced by a dismissal without prejudice, or that the dismissal with prejudice was conducive to the fair administration of justice?

As stated, the motion of the defendants for a new trial based on the newly discovered evidence that they and their counsel were electronically eavesdropped upon before and during the trial was filed only slightly more than two months before the date of the requested dismissal. Petitioners themselves were incarcerated at the time of the requested dismissal, and a dismissal without prejudice would not have effectuated their release. Similarily a continuance of the hearing date on the motion or a dismissal without prejudice would not have adversely affected or impeded the government's review of its files to determine whether any electronic eavesdropping or monitoring had affected this case. For, in **Schipani v. United States**, 385 U. S. 372, the Solicitor General advised this Court that the Justice Department was at about this very time conducting a review of its files in order to determine in which cases improper monitoring of the defense may have tainted the proceedings.

The motion for new trial should have been more seriously considered, for it is not mere idle speculation to suggest that electronic eavesdropping occurred in this case. It is well known that petitioner Hoffa has for a long time been the subject of intensive government investigation. Indeed, about one month prior to May 9, 1967, the government advised this Court that it had electronically eavesdropped on a codefendant of petitioner Hoffa in another pending case and had overheard such codefendant discussing the theory of the defense with a friend. **Hoffa v. United States**, 387 U. S. 231. And the government has also admitted that it electronically intruded on a conversation between petitioner Hoffa's trial counsel in this case and one O'Brien, a defense investigator of petitioner Hoffa. **O'Brien v. United States**, 386 U. S. 345. The log of said **O'Brien** eavesdrop has to this date been withheld by the government from petitioner Hoffa, and the pro-

priety of such withholding is in issue in **United States v. Hoffa**, No. 16634, United States Court of Appeals for the Seventh Circuit (presently pending on petition for rehearing).

Of course, other instances of the government's widespread eavesdropping activities on the councils of an accused are well known to this Court. **Levine v. United States**, 383 U. S. 265; **Roberts v. United States**, 88 S. Ct. 1; **Katz v. United States**, 9 Cir., 369 F. 2d 130; 88 S. Ct. 507.

Under these circumstances, it would appear evident that the equities of the case and concern for the doing of substantial justice should have warranted a ruling by the District Court which could not be interpreted to preclude an attempt by the defense at some time in the future to prove that government electric eavesdropping did in fact taint their convictions. The Court of Appeals construed the District Court's order as not precluding further motions on electronic surveillance grounded on matters "other than that described" in the instant motion for new trial (Appendix A, infra, p. 19). We submit that petitioners should not be precluded from urging any matter of unlawful electronic eavesdropping affecting this cause, whether the same be contained in the instant motion for new trial or be grounded on matters thereafter coming to petitioners' attention. Review by this Court of the ruling below under these circumstances seems particularly warranted.

II. **The Striking From the Motion for New Trial of Allegations of Eavesdropping on Defense Counsel and Agents.**

Herein also presented for review by this Court is the all important question of the scope of a hearing to be

conducted by a District Court where the validity of a conviction is attacked on the ground of alleged interference by the government with the defendants' effective assistance of counsel and with the defendants' right to conduct his defense unhampered by government intrusion. Of course, an accused's right to the assistance of counsel under the Sixth Amendment is vitiated if the government is permitted with immunity electronically to monitor and transcribe the private conversations of defense counsel and defendants' agents relative to the matters then pending on indictment. **Black v. United States,** 385 U. S. 26; **O'Brien v. United States,** 386 U. S. 345. Similarily, the guaranty against unreasonable searches and seizures under the Fourth Amendment is devoid of meaning if government agents may by electronic intrusions seize the conversations of an accused's representative and use such conversations or the fruits thereof to obtain a conviction. **Katz v. United States,** 88 S. Ct. 507.

A hearing seeking judicial review of whether a conviction is tainted by such government intrusion and illegal eavesdropping should be a full-scale hearing and not one limited in nature. In **Hoffa v. United States,** 387 U. S. 231, wherein the government advised this Court that a conversation between one of the defendants and a friend had been overheard by agents of the government, the government represented that the recorded conversation was only "peripherally relevant to the charges underlying" the conviction, and suggested that a hearing be held only to determine whether **such** defendant's conviction was thereby tainted. The Court however vacated the judgments of conviction as to all defendants and ordered a hearing in the District Court "on the nature and relevance to [the] convictions of the recorded conversation and **of any other conversation** that may be shown to have been overheard through similar eavesdropping" (Emphasis supplied). Thus, the Court in unequivocal language

indicated that a hearing in which the constitutionality of a conviction is in controversy should not be limited to the one instance of eavesdropping admitted by the government, but should relate to all evidence of any eavesdropping activities conducted by the government which may be shown to have tainted the conviction.

Similarly in **Kolod v. United States**, 88 S. Ct. 752 (presently pending on the government's motion to modify), this Court ordered a hearing in the District Court on the relevance to the convictions of **any conversations** shown to have been overheard through unlawful electronic surveillance at a particular place of business. Even the dissenting opinions in **Black v. United States**, supra, and **O'Brien v. United States**, supra, though not agreeing that the convictions should be reversed because of the admitted eavesdropping, believed that the petitioners in those cases were entitled in the District Court to a "full scale development of the facts."

Under these circumstances, it seems clear that the District Court here erred in striking from the motion and in refusing to permit a hearing on certain important portions of the motion for new trial (App. 238a-242a). Petitioners believe that it was highly relevant to the validity of the conviction below that petitioner Hoffa's counsel, Bufalino, was in 1962 and 1963 electronically eavesdropped upon at his home by members of the Detroit, Michigan, Police Department, and that some of such electronic eavesdropping related to the conversations between said Bufalino and other counsel "regarding legal strategy" (App. 29a-30a). Since Bufalino had acted as liaison between petitioner Hoffa, his trial counsel, and counsel for the other petitioners in this case and had had numerous telephone conversations from his home telephone relating to interviews with witnesses and legal trial strategy (App. 28a-30a), the relevancy to the validity of the conviction seems clear.

Similarly, petitioners submit that it was pertinent to the inquiry below and to the continuous pattern of government eavesdropping to prove that an electronic transmitter was found in the hotel room of petitioner Hoffa's counsel in 1961, when conferences were in progress between defense counsel relating to a pending indictment (App. 30a-31a).

And perhaps most importantly of all, petitioners believe that they were entitled to a hearing on the issue of the relevancy to this conviction of the government's admitted eavesdrop on defense investigator O'Brien. This Court in **O'Brien v. United States**, 386 U. S. 345, reversed O'Brien's conviction, and that of O'Brien's codefendant, because of the government's eavesdropping on a conversation between O'Brien and one James Haggerty, petitioner Hoffa's trial counsel in this very case. Said conversation was alleged by the government to have occurred in January, 1964, which was either just prior to or during the very trial of this case (App. 14a, 120a). Since said O'Brien was an investigator for the defense, and was in fact in Chattanooga, Tennessee, during a large portion of the trial of the cause below, it was surely not consonant with the spirit of a "full scale hearing" to deprive the defense of the opportunity to show the Court the relevance to this conviction of the government's admitted overhearing of such defense investigator.

Where the issue before the Court relates to the constitutionality of a conviction, particularly where the attack on such constitutionality is bottomed on the government's own illegal conduct, "the integrity of the record must be fully aired", and the reception of evidence ought not be narrowly limited. **United States v. Shotwell Manufacturing Company**, 355 U. S. 233; **Remmer v. United States**, 350 U. S. 377; **Communist Party v. Subversive Activities Com. Bd.**, 351 U. S. 115. In the interest of affording an adequate opportunity to test the constitutional validity

of a conviction thus obtained, this Court in the exercise of its supervisory powers should review the propriety of the Court's action below.

CONCLUSION.

For the reasons hereinabove advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Nos. 19[illegible] and 19[illegible]

United States Court of Appeals
For the Sixth Circuit

United States of America, Plaintiff-Appellee, v. James R. Hoffa, Thomas Ensco, Parks and Larry Campbell, Defendants-Appellants.	Appeals from the U. S. District Court for the Eastern District of Tennessee.

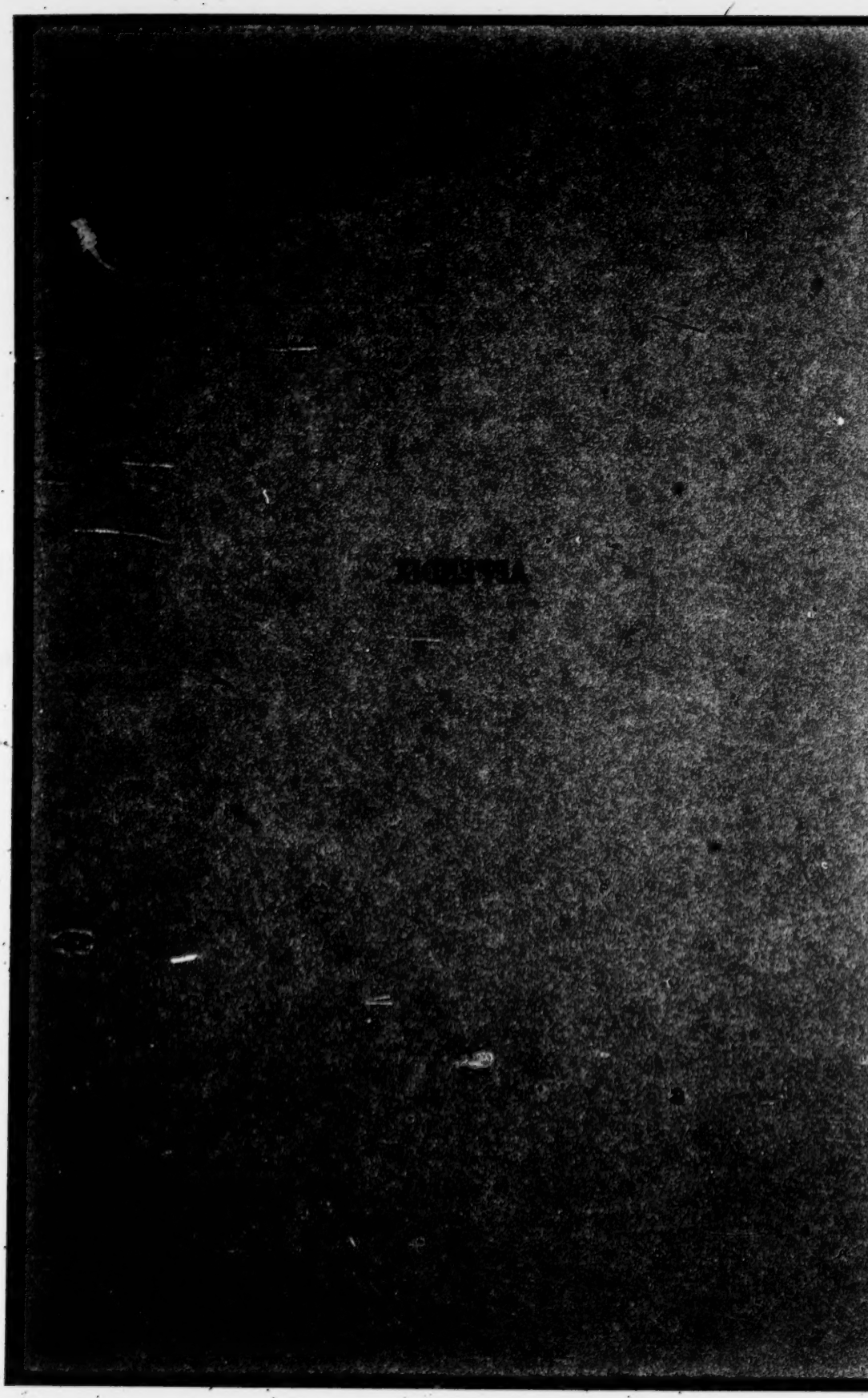
APPENDIX

Decided and Filed [illegible]

OPINION FILED JULY 26, 1967

Before: Weick, Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

[illegible], Circuit Judge. This matter involves the appeals of defendants above named from certain judgments of the [illegible] entered on a verdict of guilty by them on the above [illegible]. They had been convicted of [illegible] in violation of [illegible] U. S. C. § 1503 by a verdict returned in the District Court at Chattanooga, Tennessee, on March 4, 1964. [illegible] and their conviction upon the ground [illegible] from the jury [illegible] United States v. Hoffa, [illegible] (6th Cir. 1966), aff'd [illegible] 385 U. S. 293 (1966), rehearing denied, [illegible] 385 U. S. 1034 (1967).



APPENDIX A.

Nos. 18029, 18030 and 18031.

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. James R. Hoffa, Thomas Ewing Parks and Larry Campbell, Defendants-Appellants.	Appeals from the U. S. District Court for the Eastern District of Tennessee.

Decided July 23, 1968.

OPINION FILED JULY 23, 1968.

Before O'Sullivan, Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge. This matter involves the appeals of defendants-appellants, above named, from denial of the fourth motion for a new trial made by them in the above cause. They had been convicted of endeavoring to influence, intimidate and impede petit jurors in the discharge of their duties, in violation of 18 U. S. C., § 1503, by jury verdict returned in the District Court at Chattanooga, Tennessee, on March 4, 1964. On appeal to this Court, their conviction and the denial of their first motion for new trial were affirmed. **United States v. Hoffa**, 349 F. (2) 20 (6th Cir. 1965), **aff'd** 385 U. S. 293, 17 L. Ed. (2) 374 (1966), **rehearing denied**, February 27, 1967, 386 U. S. 951, 17 L. Ed. (2) 880 (1967).[1] A second mo-

[1] On February 20, 1967, the Supreme Court denied appellants' motion to vacate judgment, which alleged violation of their constitutional rights by the use of electronic devices, 386 U. S. 940, 17 L. Ed. (2) 880.

tion for new trial was denied and such denial was affirmed here. **United States v. Hoffa,** 376 F. (2) 1020 (6th Cir. 1967), **cert. denied,** 389 U. S. 859 (1967). The denial of a third motion for new trial, based upon allegedly newly discovered evidence of misconduct of the jurors who convicted appellants, and the United States Marshals who had charge of them, was affirmed by this Court on September 14, 1967, **United States v. Hoffa,** 382 F. (2) 856.

The fourth motion for new trial, now before us, was filed on February 28, 1967, amended April 3, 1967, and was denied by order entered May 13, 1967; this denial followed disallowance of appellants' motion for a 90-day continuance of the hearing on the motion, made on the day set for such hearing, and the refusal to allow the motion's discontinuance without prejudice.

We affirm.

This fourth motion—relying on newly discovered evidence—set out charges of improper electronic surveillence of Hoffa, his witnesses, his associates, and his attorneys, by agents of the United States. The charges were extensive, covering a period before, during and after the 1964 trial and were supported by some 20 affidavits. If true, they disclosed questionable conduct by various government agents, including one Walter Sheridan, whose employment by the Department of Justice had been for the special purpose of investigating the activities of James Hoffa in an earlier case involving Hoffa—known as the Test Fleet case. His employment extended from January, 1961, to August, 1964. The motion recited some 82 specifications of alleged misconduct—tapping telephone lines, "bugging" of hotel rooms, and like electronic surveillance.

The government's response was supported by affidavits substantially denying charges of plaintiffs' motion and its supporting affidavits. The District Judge held that an evi-

dentiary hearing should be had to resolve the factual issues framed by the opposing affidavits relating to 53 paragraphs of the motion. As to the other 19 paragraphs of the motion, he held that the allegations thereof were not relevant to the trial at which appellants were convicted, and they were accordingly stricken. On March 27, 1967, with the agreement of all counsel, the evidentiary hearing was set to go forward on May 8, 1967.

1. The stricken allegations.

The stricken allegations relate, a) to alleged electronic surveillance of the Florida hotel rooms of James Hoffa and his attorney in 1961 before the happening of any of the events involved in the prosecutions before us; b) to some alleged tapping of the residence telephone of a William Buffalino, one of Hoffa's attorneys, by Detroit police officers, but the only claim of involvement of federal officers was an unsupported expression by an affiant Detroit officer that he "was under the belief that these were taps for the federal government"; and c) to the electronic surveillance of two telephone conversations involving one Charles O'Brien, apparently an associate of Hoffa, but as the District Judge correctly found,

> "Exhibits to the defendants' motion in this respect reflect that the two monitored conversations of O'Brien related only to matters regarding his own pending trial."

We agree with the District Judge that such allegations were not sufficiently relevant or material to the trial of the defendants-appellants to require taking testimony concerning them. They were properly stricken.

2. Denial of continuance and discontinuance without prejudice.

On the day finally set for the evidentiary hearing—May 9, 1967—and without earlier request or notice, de-

fendants' counsel moved for a 90-day continuance on the ground that,

> "Within the last several days, certain information has come to the attention of counsel. This information is of such a nature that counsel feel it would be improper for them to proceed with the Motion at this time. This information has been communicated to this defendant [Hoffa], and counsel are authorized in his behalf to ask this Court that this matter be continued for a period of ninety days. Counsel and this defendant feel that to proceed without being fully informed on the matters that were brought to their attention within the last few days would be most improper."

The other appellants joined in this motion. Invited to do so by the District Judge, counsel did not elaborate upon the motion or disclose the nature of the "certain information" that had come to their attention. Neither did counsel disclose what circumstance forbade their disclosing the "certain information". Upon the District Judge's indication that no adequate ground for continuance had been shown, appellants' counsel moved in the alternative that they be allowed to discontinue their motion for new trial without prejudice. The District Judge observed:

> "Gentlemen, I believe that the motion to be allowed to dismiss should be overruled. This matter has been pending now for several months and the hearing date set for today was the date which was requested by counsel for the defendants after the Court had suggested an earlier date. I believe the motion should be overruled, the motion to dismiss [without prejudice], and we should proceed."

Appellants declined to proceed, and the District Judge denied the motion for continuance and for leave to discontinue without prejudice. Thereafter, and on May 19,

1967, the judge entered a final order dismissing and denying the motion for a new trial. We consider that denial of the motions for continuance and for leave to dismiss without prejudice were matters addressed to the discretion of the District Judge, which was not in this regard abused.

His final order concluded:

> "It is accordingly Ordered that the motion for new trial filed upon behalf of each defendant upon February 28, 1967, as amended upon April 3, 1967, be and the same is hereby denied as to each ground thereof, the same having been found to be without merit by the Court, and the motion is accordingly dismissed."

The relevant factual allegations of appellants' motion having been put in issue by the government's affidavits traversing them, the burden was on appellants to go forward with the proofs to sustain their charges; declining to do so, it was proper for the District Judge to deny and dismiss the motion.

In their address to us, appellants express concern that such order would bar any further motions to the District Court should it later be discovered that the government had been guilty of misconduct or electronic surveillance other than that described in the fourth motion for new trial. We do not consider the District Court's disposition of the matter as a holding, as a matter of law, that conduct such as that described in appellants' motion would not, if proven, be grounds for a new trial. Given the opportunity to prove the motion's allegations, appellants declined to do so. It was for that reason the motion was denied, and we affirm for that reason.

Judgment affirmed.

APPENDIX B.

In the United States District Court for the
Middle District of Tennessee,
Southern Division.

United States of America, v. James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King.	Criminal No. 11.989.

OPINION—FILED MAY 10, 1967.

This case is before the Court upon a motion for new trial filed on behalf of each defendant, James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King. The motion was filed in this Court upon February 28, 1967 and amended upon April 3, 1967.

The defendants were each convicted on March 4, 1964, of violating the Federal Obstruction of Justice Act (18 U. S. C. 1503), in that they did willfully endeavor to influence, intimidate and impede jurors in the discharge of their duties. An original motion for new trial was filed on behalf of each defendant immediately after the trial. That motion was overruled. Thereupon an appeal was taken on behalf of each defendant, resulting in the conviction of each defendant being affirmed by the Court of Appeals on July 29, 1965. **United States v. Hoffa**, 349 F. 2d 20.

Certiorari having been granted by the United States Supreme Court, the conviction of each defendant was affirmed by that Court upon December 12, 1966. **Hoffa v. United States**, ... U. S. ..., 17 L. Ed. 2d 374, 87 S. Ct.

.... A rehearing was denied by the United States Supreme Court upon February 27, 1967. **Hoffa v. United States,** ... U. S. ..., 17 L. Ed. 2d 880, ... S. Ct. .... The defendants were thereupon committed to the custody of the Attorney General to commence serving their respective sentences upon March 7, 1967.

Meanwhile, and during the pendency of the above appeal, a second and third motion for new trial were filed on behalf of each defendant. These motions, based upon allegations of newly discovered evidence, were denied by this Court. **United States v. Hoffa,** 245 F. Supp. 772; **United States v. Hoffa,** 247 F. Supp. 692. The action of this Court in denying the second motion was affirmed by the Court of Appeals by an opinion filed May 2, 1967 (Nos. 16,567; 16,568; 16,569; and 16,570).

The present motion for new trial, being the fourth motion for new trial and the third such motion based upon allegations of newly discovered evidence, asserts that the defendants have recently acquired information that they and their attorneys were subjected to unlawful surveillance by Government agents by means of wiretapping, electronic eavesdropping, or other intrusions both prior to and during the trial in which they were convicted. The motion is supported by a number of affidavits. The Government responded to the present motion, denying each allegation of surveillance, wiretapping, electronic eavesdropping, or other intrusions upon the defendants' rights and filed a number of affidavits in support of such denials. Upon this state of the record, and as prayed for in the defendants' motion, an evidentiary hearing was ordered by the Court upon the issues of fact raised in the defendants' motion, as amended, and the Government's response thereto. By order entered March 27, 1967, the evidentiary hearing was set to commence upon May 8, 1967. Upon request of the Government and the defendants consenting thereto, the com-

mencement of the evidentiary hearing was delayed to May 9, 1967.

Upon the date of the hearing, May 9, 1967, the defendants each appeared in open court with their respective counsel and moved the Court for a continuance of the evidentiary hearing for a period of 90 days, the motion for continuance being predicated upon the allegation that counsel for the defendants had recently received information which in their opinion made it improper for them to proceed. The nature of the information was not disclosed unto the Court, other than to advise the Court that such information related to the matters in issue in the evidentiary hearing and that counsel did not feel that, as a matter of ethics, they could proceed with the evidentiary hearing, nor did they feel that they could disclose the information under their obligations unto their respective clients. The motion for continuance was thereupon denied.

A motion was then made on behalf of such defendants to be allowed to dismiss the present motion for new trial, such dismissal to be without prejudice to their right to refile the same or any portion thereof. The motion to be allowed to dismiss was based upon the same grounds as stated in support of the motion to continue, and was likewise denied by the Court. Thereupon the defendants were called upon to present any matter or matters or introduce any evidence which they wished to present or introduce in support of their motion for new trial, but they declined to do so, advising the Court that they did not propose to offer any further matters in behalf of the motion for new trial. The Government then moved that the motion for new trial be dismissed, and this motion to dismiss was taken under advisement by the Court. The evidentiary hearing was adjourned upon this state of the record.

The Court is of the opinion that the motion for new trial filed herein under date of February 28, 1967, as

amended upon April 3, 1967, should be denied as to each of the grounds asserted therein. The defendants have failed to establish that their rights were violated in any respect by the Government as alleged in the motion. It is sufficient cause for denial of the motion that the defendants have defaulted in the presentation of any evidence in support of their motion upon the evidentiary hearing. The burden of proof in regard to a motion for new trial upon the ground of newly discovered evidence is of course upon the defendant. Having failed to present any evidence, the defendants herein have failed to carry that burden.

Although no precedent has been cited unto the Court, and none has come to the attention of the Court, wherein a rule was established with respect to what weight, if any, was to be given to affidavits in support of a motion for new trial and where an evidentiary hearing was ordered on the motion and the defendant defaulted in the production of any evidence at the hearing, the Court is of the opinion that the proper rule in this respect is that the affidavit of a witness filed in support of the motion is entitled to no further weight nor consideration after an opportunity has been afforded unto the defendant to produce the witness for examination and cross-examination at an evidentiary hearing and the defendant fails, without reason, to produce the witness. In this regard, see **Glasser v. United States**, 315 U. S. 60, 86 L. ed. 680, 62 S. Ct. 457, reh. den. 315 U. S. 827, 86 L. ed. 1222, 62 S. Ct. 629.

Moreover, even should the affidavits filed herein in support of the motion remain a matter for consideration, they were in each instance specifically and fully denied by counter-affidavits. As stated at 39 **Am. Jur.**, "New Trial," Section 198:

> "To warrant the setting aside of a verdict on a motion for new trial, the evidence should be clear

> and satisfactory. In view of the temptation to obtain a rehearing after an adverse verdict, particularly in a criminal case, and in view also of the facility with which affidavits for this purpose can be obtained, all such evidence should be scrutinized with the greatest care and caution."

Upon the present state of the record there is little, if any, cause for the Court to place credence in the affidavits filed in support of the motion. The action of counsel for the defendants in declining to call the witness when afforded the opportunity to do so would reasonably indicate to the Court that such counsel may have learned of matters in their preparation for the hearing which caused them to be unwilling to further assert or vouch for the truth of the matters set forth in the affidavits filed in support of the motion. Should this be the case, while it would be commendable for counsel to decline presenting matters unto the Court as true when in fact they have no belief in the truth of the matters, it would likewise be regrettable that the investigation leading to this conclusion was not undertaken and completed prior to the filing of the affidavits in the United States Supreme Court and in this court. Upon the present record the Court would accordingly find that no credible evidence has been presented by affidavits or otherwise that any wiretapping, electronic eavesdropping or other unlawful surveillance or intrusion upon the defendants' rights were committed by the Government either prior to or during the course of the trial in which they were convicted.

Finally, and in addition to the foregoing, certain portions of the defendants' motion failed as a matter of law to assert grounds for a new trial. These matters were covered in the order of this Court as entered upon April 26, 1967, wherein the Court defined the scope of the evidentiary hearing and stated its reasons for excluding certain matters from the evidentiary hearing. As there

stated, general allegations of violations of the defendants' rights, unsupported by affidavit or specifications of fact, as well as allegations of wiretapping or eavesdropping upon others, and not shown in any way to relate to the rights of these defendants, are insufficient as a matter of law to support a motion for new trial based upon an allegation of newly discovered evidence.

An order will enter dismissing with prejudice the motion for new trial with respect to each ground thereof.

/s/ Frank W. Wilson,
United States District Judge.

APPENDIX C.

United States Court of Appeals
for the Sixth Circuit.

No. 18,029.

United States of America,
Plaintiff-Appellee,

vs.

James R. Hoffa,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

Issued as Mandate:

Costs:

Filing Fee .....$

Printing .....$

Total $

United States Court of Appeals
for the Sixth Circuit.

No. 18,030.

United States of America,
Plaintiff-Appellee,

vs.

Thomas Ewing Parks,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

Issued as Mandate:

Costs:

Filing Fee .....$

Printing .....$

Total $

United States Court of Appeals
for the Sixth Circuit.

No. 18,031.

United States of America,
Plaintiff-Appellee,

vs.

Larry Campbell,
Defendant-Appellant.

Before: O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT—FILED JULY 23, 1968.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39 (b).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

Carl W. Reuss, Clerk.

Issued as Mandate:

Costs:

Filing Fee .....$

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Total $